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OFFICE OF PETITIONS

In re Application of
Arbogast et al. : DECISION ON
Application No. 10/661,032 : PETITION
Filed: September 11, 2003 :
Attorney Docket No. 57637-1185 :

This is a decision on the petition filed June 7, 2004, requesting that the above-identified application be accorded a filing date of September 11, 2003, instead of the present filing date of March 22, 2004.

As previously stated in the Notice to File Missing Parts of Nonprovisional Application - Filing Date Granted (Notice) of January 20, 2004, the above-identified application had been accorded a filing date of September 11, 2003. The Notice indicated, *inter alia*, that Replacement drawings in compliance with 37 CFR 1.84 and 37 CFR 1.121 were required and that Figure 35 appeared to have been omitted upon filing the application.

In the present petition, applicant admits that Figure 35 was omitted on filing. In response to the Notice to File Missing Parts, on March 22, 2004, applicant submitted Figures 1 through 40R, including omitted Figure 35. Applicant states that the inclusion of Figure 35 does not constitute new matter because it was the same as Figure 34 in the parent application, U.S. Application No. 10/379,287, which was incorporated by reference in the present application.

The Office of Initial Patent Examination changed the application filing date to March 22, 2004, the date of receipt of Figure 35. However, applicant now requests the earlier filing date of September 11, 2003. Figure 35 cannot be granted the filing date of September 11, 2003, as part of the original disclosure because it was not present on filing. However, in view of the incorporation by

reference of the prior application, applicant may file an amendment to the examiner to include Figure 35 without a petition. See MPEP 201.06(c)

Accordingly, the petition is granted to the extent that the application will be accorded a filing date of September 11, 2003, using Figures 1-34 and 36-40R. Figure 35 will NOT be entered at this time.

The \$130.00 petition fee will not be refunded because the filing of the petition was not necessitated by USPTO error.

The Office notes that applicant submitted a Second Preliminary Amendment to insert a benefit claim to one or more prior copending nonprovisional applications and prior-filed provisional applications pursuant to 37 CFR 1.78(a)(1) and (a)(4). **Because the filing date of the present application has been changed to September 11, 2003, the claim for the benefit of priority to the prior-filed applications is untimely pursuant to 37 CFR 1.78(a)(2)(ii). Accordingly, applicant must submit a petition under 37 CFR 1.78(a)(3) and (a)(6) with the requisite fees.**

The Office of Initial Patent Examination is directed **to correct the filing date to September 11, 2003, using Figures 1-34 and 36-40R. Figure 35 will NOT be entered at this time.** The Office is also directed to mail a corrected filing receipt.

Any inquiries related to this decision should be directed to the undersigned at (571) 272-3211.

Christina Tartera Donnell

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